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Chairman: Mr. MORÁN (Spain)

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INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued)

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The meeting was called to order at 3.15 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter I, section C

1. Mr. OLIVENCIA (Spain), referring to paragraph 12, said that the Spanish version of the draft guidelines must refer to preparatory conferences in the plural.

2. Paragraph 13 should clearly indicate that harmonized international guidelines helped in determining whether or not to hold a preparatory conference, how such a conference should be prepared and the topics to be dealt with. The Spanish version of the text, which, unlike the other language versions, used the imperative, must be corrected. Indeed, the use of the indicative in the words "estas directrices explican cuáles deben ser los objetivos de una reunión preparatoria y ... los temas que deben considerarse en esas reuniones" was unsuitable in a text on guidelines.

3. According to paragraph 14, the Guidelines would contribute to the dissemination of knowledge about arbitration and foster better understanding and harmonization of arbitration procedures. They could also contribute to the dissemination of the advantages of arbitration as a procedure different from judicial procedures.

Section D

4. Mr. HOLTZMANN (United States of America) said that chapter I, section D, was the first section containing texts in square brackets, which meant that the deletion of the bracketed portions would not adversely affect the aim of the guidelines.

5. Paragraph 17 seemed to suggest that the parties had to be asked at the beginning of the arbitral proceedings whether they wished to add to or modify the agreed rules. He wondered why an arbitrator would again raise an issue that had already been settled if the parties themselves did not do so and there were no specific reasons for doing so. That would complicate the proceedings, and the task of modifying the rules entailed time, effort and money. The secretariat had rightly noted in paragraph 17 how difficult and dangerous it was to modify rules. Consequently, his delegation proposed that paragraph 17 and the final sentence of paragraph 16 should be deleted.

6. His initial reaction to paragraph 18 was that it repeated ideas that were already set out in paragraph 2. If its aim was to take substantive issues as well as procedural issues into consideration, then it might be useful. However, in view of the fact that his delegation had reservations regarding the inclusion of issues relating to the substance or merits of the dispute, it preferred to leave it to the secretariat to determine the matter based on how the discussions evolved.

7. Mr. LEVY (Canada) said that he agreed almost entirely with the previous speaker concerning the problems raised by paragraphs 16 and 17 and that the second sentence of paragraph 16 and paragraph 17 as a whole should be deleted. One idea in paragraph 17 should be retained, although not in its current form, since it raised the prospect of unnecessary activities at a preparatory conference.

8. The need to ensure that the Guidelines did not conflict with arbitration rules, particularly those of the arbitral institutions which had their own rules, could be met by retaining paragraph 18, to which the words "or the rules of the arbitral institution where the arbitration takes place" should be added.

9. Mr. ABASCAL ZAMORA (Mexico) said that in paragraph 15 of the Spanish text the words "conforme al reglamento de arbitraje" should be replaced by the words "dentro de los límites del reglamento de arbitraje".

10. While he agreed with the representative of the United States of America where paragraph 17 was concerned, he felt that the idea of recommending to the arbitrators and the parties not to make modifications to the arbitration rules should be retained. Otherwise counsel with more zeal than experience might create problems.

11. Mr. GRIFFITH (Observer for Australia) said that much of what was contained in the Guidelines could be described as discursive elucidation as opposed to a direct statement of principles. For the sake of users, it would be advisable to adopt a uniform style for all paragraphs that would begin with a statement of the applicable principle. Thus, paragraph 15 might begin with the sentence "A preparatory conference is to be carried out within the limits of the arbitration rules", adding afterwards that that was because the Guidelines were not binding and should not in principle violate the agreed rules. Similarly, paragraph 18 ought to start with the principle "The preparatory conference should not take any decisions that violate the provisions of the law applicable to the arbitration".

12. He agreed that it was not a good idea to invite the parties to make modifications and therefore supported the proposal to delete paragraph 17. The issue of taking decisions that entailed modifications or additions should also be borne in mind; the best solution there would be for the parties to work out an agreement in writing.

13. Mr. ZHANG Qikun (China) agreed with the representatives of Canada and the United States of America that the purpose of preparatory conferences was to speed up arbitral proceedings; that would be incompatible with the idea of allowing the parties to modify issues already agreed upon.

14. Mr. DUCHEK (Austria) shared the view that paragraph 17 had more drawbacks than advantages. However, instead of deleting it, a sentence should be added to caution the parties that any decisions they took pursuant to the Guidelines must be compatible with the procedural rules they had agreed to follow in the arbitration. In paragraph 18, the words "should not violate" should be replaced by the words "must not violate".

15. Mr. TUVAYANOND (Thailand) said that while he agreed in principle with the previous speakers, the principle of free will dictated that the parties could not be prevented from modifying any decision they had agreed on if they felt it was in their interest to do so. It would be incompatible with that principle for an arbitral institution, when administering an arbitration, to reserve the right not to accept any proposed modification of the rules. A possible exception might be found in the case of arbitration rules, which must be binding on the parties. He agreed that the words "should not violate" in paragraph 18, should be replaced by "must not violate". In paragraph 17, which had useful elements, the words "The parties should be mindful ..." at the beginning of the fifth sentence, should be followed by a provision to prevent any stalling tactics, as unnecessary delays should be avoided.

16. Mr. CHOUKRI SBAI (Morocco) said that he favoured retaining only the last sentence of paragraph 17, which could be inserted somewhere else. Whenever a modification of procedure was desired, such modification should be made in consultation with the arbitral tribunal. He also favoured merging paragraphs 16 and 18, since both of them were aimed at preventing a modification of the arbitration rules agreed by the parties. The provisions of paragraph 18 should not be incompatible with the law applicable to the arbitration. That would ensure the observance of both arbitration rules and applicable laws.

17. Mr. GRIFFITH (Observer for Australia) supported the suggestion to merge paragraphs 16 and 18.

18. Mr. SHIMIZU (Japan) said that the preparatory conference should not be organized solely within the confines of law applicable to the arbitration but also in accordance with established practice concerning the application of that law. He therefore suggested adding in paragraph 15 wording to the effect that the draft Guidelines were not meant to replace current practice.

19. Mr. LEVY (Canada) agreed that paragraphs 16 and 18 should be merged provided that the last two sentences of paragraph 16 were deleted. The text would then read: "The decision to use the Guidelines does not imply any modification of the arbitration rules that the parties may have agreed upon. It should be borne in mind that whatever decisions are taken as a result of the preparatory conference, they should not violate provisions of the law applicable to the arbitration that cannot be derogated from."

20. Mr. HOLTZMANN (United States of America) said that he had some reservations concerning the suggestion by the representative of Japan to refer to current practice. There was a consensus that whatever took place at a preparatory conference had to be in conformity with the rules and other agreements reached by the parties, while the term "practice" evoked uncharted territory.

Chapter II

21. Mr. GRIFFITH (Observer for Australia) proposed that the square brackets in paragraph 23 should be deleted. It was very important for the parties, witnesses and experts to participate in the arbitration, and while the presence at the preparatory conference of legal counsel ought to suffice, the possibility of letting the parties, experts and witnesses participate should be left open.

He also suggested that the word "procedural" after the word "tribunal" in the second sentence of paragraph 22 should be deleted.

22. Mr. ABASCAL ZAMORA (Mexico), referring to the Spanish text, said that the end of third line in paragraph 19 should read "flexibilidad y discrecionalidad". As the secretariat had noted, the reference in paragraph 20 first to "la norma procesal" and then to "el derecho procesal" gave rise to confusion. The words "normas de igualdad" in the fifth sentence of paragraph 22 should be replaced by "normas de equidad". In paragraphs 21 and 22, which dealt with cases in which one party objected to the holding of a preparatory conference or failed to participate in the conference, it would be preferable for the text to dissuade parties from objecting to or failing to attend preparatory conferences. Those paragraphs should stress that the Tribunal was empowered to rule on procedural issues provided that the parties were treated equally and were given a full opportunity to express their views. As it was, the current text gave the parties a great deal of latitude to object to the work of the tribunal or to obstruct it. The third sentence of paragraph 22 in particular even allowed the tribunal to suspend the conference, which would occasion additional expenditure or delays for the parties. A party must have well founded reasons for objecting to the holding of a preparatory conference, let alone failing to attend it.

23. Mr. LEVY (Canada) said that one of the reasons why alternate methods of dispute resolution such as arbitration were often used was to avoid the courts and the hard positions that were taken there. In the commercial world, the advantage of resolving a dispute by amicable means lay not only in savings of time and money but also in a possible continuation of the business relationship between the parties, whereas when the parties decided to turn to a court of law to resolve their differences, that probably meant the end of what might have been a good commercial relationship. For those reasons, it might be possible to expand paragraph 23, since the preparatory conference could afford the parties with an opportunity for settling their differences, given that it was frequently the first time that they met to discuss the dispute. In such cases, the arbitrators should not be present or involved in any way, because if they participated and the settlement talks failed, their position could be seriously compromised. It was impossible to be a mediator or conciliator and an arbitrator at the same time. It would therefore be useful if some way could be found to mention in paragraph 23 that if the parties were present at the preparatory conference, which was not always the case, they had an opportunity to settle their differences even before the arbitration proceedings began.

24. The wording of paragraph 24 seemed to imply that the need to hold preparatory conferences depended on the number of procedural issues to be resolved or their complexity. The decision to hold a face-to-face meeting was not necessarily based on those factors but rather on many others, such as the dynamics between the parties. Apart from face-to-face meetings, paragraph 24 should also mention that preparatory meetings could take other forms including conference calls, teleconferencing and facsimile communications.

25. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that paragraph 23 was an example of material in square brackets which was clearly useful even though not absolutely necessary. As to its content, it should be reordered so as to indicate that when the parties were

represented by legal counsel or by agents it was usual for those representatives to be present at a preparatory conference; it should then be noted that on some occasions it might also be useful for the parties to be present, especially where the legal representatives needed to be given immediate instructions so that decisions could be taken during the conference. In the case of the second sentence, he was somewhat doubtful that the arbitral tribunal should indicate in the invitation to the conference that only legal counsel might be present, as that was for the parties to decide.

26. Mr. HOLTZMANN (United States of America) said, with respect to paragraph 23, that it would be unwise for arbitrators or UNCITRAL to consider telling the parties whom to bring to a hearing. If parties wanted to come without legal counsel, it was not for UNCITRAL to tell them that they should have brought their lawyer or to tell them that they should not come but only send their lawyers. That having been said, there seemed little left in paragraph 23. He therefore thought that the paragraph was unnecessary and took the Commission into areas it need not enter. However, if the secretariat felt that there was something valuable to be salvaged from paragraph 23, he would consider a new draft with interest.

27. The last sentence of paragraph 21, which said that "a negative attitude might indicate that a preparatory conference should not be held since it may not fully meet its objectives", should be deleted. The fact that one of the parties might object to the conference should not deny the arbitral tribunal or the other party the benefit of planning an efficient procedure. A preparatory conference could be especially important when one of the parties failed to appear because it was then that the arbitral tribunal needed all the help it could get, and it could only get that help from one of the parties. As one party could not stop an arbitration, there was an obligation on the arbitral tribunal to be particularly fair in such circumstances.

28. Mr. TUVAYANOND (Thailand) said that paragraph 23 might be useful, but the phrase "the arbitral tribunal may indicate in the invitation to the conference that" should be deleted, so that the sentence would read: "Sometimes, however, in view of the types of questions to be discussed, it would satisfy the objectives of the conference if only the legal counsel are present". The rest of the paragraph would remain unchanged and the brackets should be deleted.

29. As drafted, paragraph 22 could be dangerous. It would be strange for the arbitrators not to listen to the parties, because the power of the arbitrators came from the consent of the parties. If a party had a reservation or objection to a conference, whether justified or not, any decisions the arbitrators might make in the pre-hearing phase should be limited only to procedural matters; otherwise the principle that each party should be given a full opportunity to present its case would be violated. The preparatory conference should accordingly be limited to the preparation of the arbitration and not deal with the settlement of the dispute. Decisions on questions of substance should not be permitted in the preparatory conference, which could be convened, if need be, solely for the purpose of deciding procedural matters.

30. Mr. CHOUKRI SBAI (Morocco) said he agreed with the representatives of Canada, the United States of America and other countries that the part of

paragraph 23 referring to exceptions should be deleted. The arbitral tribunal could make that point clear during the proceedings. In his opinion, not only was the presence of the parties useful but their absence might prejudice their right to defend themselves. The parties had a right to be present, and it was they who should bear the burden of time and money involved in the arbitral proceedings. He therefore proposed that the drafting group should delete the brackets and leave only a single sentence in paragraph 23 reading: "The parties themselves, their legal counsel and any other representatives of the parties may participate in the preparatory conference".

31. Mr. OLIVENCIA (Spain) said that paragraph 19 took a negative approach in saying that the arbitral tribunal should "take care that the holding of a preparatory conference does not add unnecessarily to the costs of the proceedings or prove to be an administrative burden"; it should be reworded positively to emphasize the benefits of a preparatory conference. Preparatory conferences were acceptable only if they were or could be beneficial, and that decision was for the tribunal to make. Preparatory conferences were not essential, as no provision was made for them in arbitration rules and laws, but they could be useful, and it was that positive aspect of preparatory conferences on which guidelines for them should be based.

32. Paragraph 20 dealt with existing arbitration rules and laws. In addition to reflecting current reality, it would also be helpful to add that a preparatory conference should be convened after consulting the parties.

33. He shared the view that paragraph 23 should be retained but reordered. It was usual for legal counsel to participate in the conference, especially when they represented the parties, but the participation of the parties themselves or their representatives should not be ruled out. The question of who should participate in the conference could be decided on the basis of the subject-matter to be discussed.

34. As to whether the parties ought to participate in the first conference, where the issues to be discussed were determined, a question arose for which no uniform standard of judgement existed, that of whether questions relating to the substantive issues to be arbitrated could be discussed. In his view, such points could be dealt with and in practice were. That helped to bring the positions of the parties closer and eliminate questions in dispute, so that the conference became a useful means of mediation.

35. Mr. ZHANG Qikun (China) said that paragraph 23 should be kept. In order to remove the brackets, the portion of it relating to the subject of the conference should be redrafted to indicate the types of questions to be discussed so that the parties could decide who should represent them in the conference.

Section A

36. Mr. TUVAYANOND (Thailand) said that paragraph 25 expressed his delegation's view that a preparatory conference should be convened only when it was necessary, such as when, for example, a tribunal was uncertain of its mandate, and he therefore favoured keeping the paragraph in its present form.

37. In paragraph 27 reference was made to the possibility that the parties might not have a clear idea as to the manner of proceeding. That was strange, as the parties usually studied the arbitration rules before deciding which to apply and learned about the advantages and disadvantages of the various arbitral tribunals in existence before resorting to one of them. Moreover, it was usually the parties who decided for the tribunal the scope and contents of the tribunal's mandate and not the other way round.

38. Mr. SEKOLEC (International Trade Law Branch) explained that that provision, which was mentioned in the introduction to the draft Guidelines, was based on the assumption that there would be no doubt as to the mandate of the arbitral tribunal; the purpose of the consultations mentioned was to give the parties some guidance regarding the form the proceedings would take, in order to avoid any surprises. Arbitral rules frequently conferred broad discretionary powers on the tribunal as to the form the proceedings could take. Furthermore, the parties might have different expectations in that regard, especially if they came from different geographical regions with different legal traditions. Arbitral actions could take many forms, which was why the tribunal must tell the parties as precisely as possible how it was going to proceed, so that they could know what to expect and could better prepare for the actual arbitration.

39. Mr. GRIFFITH (Observer for Australia) noted that paragraph 25, which mentioned the possibility that convening a preparatory conference might not be a necessity, was contradictory to the title of section A ("Cases in which preparatory conference may be useful") and should be moved, perhaps following paragraph 11.

40. Mr. ABASCAL ZAMORA (Mexico) said that some arbitration rules referred to different techniques that made it possible to avoid the convening of a preparatory conference, such as sending questionnaires to the parties concerning their procedural expectations or requesting them to inform the tribunal in writing of their views on the particulars. He suggested that those techniques should be mentioned in section A.

Section B

41. Mr. OLIVENCIA (Spain) said that the title should be changed to read "Preparatory conferences", and the reference in any case should be to "a" and not "the" preparatory conference. It would also be appropriate to indicate in that section that the purpose of the conference always related to planning but not always to procedure. Moreover, in the Spanish text, the word "procedimiento" should be used rather than "proceso". Finally, he did not agree with the wording of the first sentence of paragraph 31, since the holding of more than one conference was not exceptional.

Section C

42. Mr. TUVAYANOND (Thailand) said that paragraph 33 was acceptable where it referred to decisions on questions of procedure; only the tribunal, however, could take decisions concerning the substance of the dispute, with the agreement of all the interested parties. In order to be able to remove the brackets, then, the paragraph should be redrafted in order to reflect that principle.

43. It would be appropriate to combine the two approaches mentioned in paragraph 34. In other words, decisions would be taken in consultation with the parties and, if they were related to the questions that should be added to the document previously signed by the parties, another agreement could be concluded that would become an integral part of the original agreement.

44. Mr. HOLTZMANN (United States of America) also favoured the deletion of paragraph 33, since the substance of the dispute should not be discussed at the preparatory conferences. If it was retained, the word "merits" should be used instead of "substance" in the English text. The latter expression was ambiguous and might cause problems, since lawyers did not always agree on where to draw the line between questions that dealt with procedure and those that did not.

45. In paragraph 35, the second sentence undermined the principle that the arbitral tribunal enjoyed much latitude in determining procedure, and it should therefore be reworded in accordance with that principle. Specifically, it should indicate that the tribunal could take decisions at the conference without any need for agreement between the two parties. Finally, he had consulted the American Arbitration Association with regard to the second sentence of paragraph 36, about which he had some reservations. In fact, that sentence did run counter to the general purpose of preparatory conferences, which was to prevent the flexibility of the arbitral process from resulting in unpredictability. Furthermore, the preparations for an arbitral proceeding eventually reached a stage where the parties should know for certain what procedure would be followed. Consequently, firm decisions had to be taken on the matter at that stage, so that the parties could prepare for the proceeding. Naturally, the tribunal had the right to change its decisions if circumstances changed. Therefore, if a reference was to be made to that right, it should be in the introduction to paragraph 36 and not in the second sentence, which should emphasize the need for the tribunal to take specific decisions on matters of procedure.

46. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that paragraph 33 was neither necessary nor particularly useful and could be deleted. If it was retained, it should be amended as suggested by the United States of America, bearing in mind the reservations expressed by Thailand concerning the determination of disputed issues. The distinction between a meeting between the parties and the arbitrators and a hearing or trial was that the latter gave each party a formal opportunity to formulate its allegations.

47. Mr. OLIVENCIA (Spain) favoured amending paragraph 33 rather than deleting it. If the text was amended in accordance with the suggestions made by the representative of the United States of America and the observer for the International Council for Commercial Arbitration, there would be no need to refer to decisions on matters of substance. Rather, the possibility that the conference could address matters that were not strictly procedural but referred to the materia decidendi and the petitions of the parties should be mentioned.

48. It was important that controversial issues and undisputed questions of fact or law should be defined at the preparatory conference, as provided for in sections D and E of the check-list of possible topics for the conference; the

point was to delineate what must be decided and what must be proven, but not to take decisions on the substance of the matter.

49. Mr. AL-NASSER (Saudi Arabia), referring first to paragraph 33, supported the comments of the United States of America and the International Council for Commercial Arbitration and suggested that, if the paragraph was retained, the phrase "if these questions are not defined by the parties to the dispute" should be added.

50. The last sentence of paragraph 34 should be deleted, since preparatory conferences should concern themselves with matters of procedure.

51. The text of paragraph 35 gave the impression that it was in contradiction with paragraph 34, because it raised the possibility of an arbitral tribunal adopting a decision without taking into account the parties to the dispute.

52. Mr. LEVY (Canada) said that the section under consideration could make reference to the possibility of the parties deciding at a preparatory conference to refuse the recourse of appeal to a tribunal when authorized by the applicable legislation. The question of the recognition or enforcement of arbitral judgements should also be borne in mind; articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration referred to that matter.

The meeting rose at 6.05 p.m.